

LETTER OPINION
98-L-146

September 16, 1998

Ms. Cynthia M. Feland
Grant County State's Attorney
PO Box 104
Carson, ND 58529-0104

Dear Ms. Feland:

Thank you for your letter asking whether the county auditor and county treasurer may refuse to comply with the Grant County Commission's directive to issue and hold checks for certain payments based on an opinion in which I previously determined the payments were not legally permissible. See 1998 N.D. Op. Att'y Gen. 94. It is my understanding that this determination is being challenged through court action, but has not yet been decided by the courts. The opinion is therefore still in effect.

The answer to your question depends, in part, on the legal effect of that Attorney General's opinion. The Attorney General is "the chief law officer of the state -- the responsible legal adviser for . . . state officers, whose opinions shall guide these officers until superseded by judicial decision. . . ." State v. Baker, 21 N.W.2d 355, 364 (N.D. 1945). State officials who consult with the Attorney General and follow the Attorney General's opinion are protected when performing their duties, "and even though the opinion thus given them be later held to be erroneous, they will be protected by it. If they do not follow this course, they will be derelict to their duty and act at their peril." Id.

In Baker the State Auditor refused to make payment for expenditures of funds although the Attorney General opined that the expenditures were constitutional. The court held that the Auditor's duty in regard to payment was "purely ministerial" and that the Auditor could come to no harm on her bond or face any claim of dereliction of duty because she would be complying with the Attorney General's opinion. Baker, 21 N.W.2d at 362-364.

The same reasons given in Baker stating the effect of an Attorney General's opinion on the ministerial duties of state officers

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logically apply to a county state's attorney's opinion to a county officer. One of the duties of the county state's attorney is to give an opinion in writing to county officers on matters relating to the duties of their respective offices. N.D.C.C. § 11-16-01(9). Likewise, the Attorney General has the statutory duty to consult with and advise state officers concerning the duties of their offices. The Attorney General also has the duty to consult with and advise the several county state's attorneys in matters relating to the duties of their offices. N.D.C.C. § 54-12-01(4), (6). The issuance of a check by the county treasurer and the county auditor as authorized by the county commission is a ministerial duty.

It is my understanding that you concur with the conclusions reached in 1998 N.D. Op. Att'y Gen. 94, and have so advised the county auditor and the county treasurer. Therefore, following the rationale set forth in Baker, unless and until a court of competent jurisdiction rules otherwise, the conclusions in that opinion, together with your concurrence, are binding on the county auditor and county treasurer.

1998 N.D. Op. Att'y Gen. 94 determined the payments to the county commission were not lawful. You concurred with that opinion. It is therefore my opinion that the county auditor and county treasurer may refuse to issue checks to the county commissioners for the purchase of health insurance policies. It is my further opinion that as long as county officers rely on an opinion of either the Attorney General or the county state's attorney which has not been overturned by the courts, the county officers are not subject to personal liability or claims that they are derelict in their duties under the law. However, in the event a court of competent jurisdiction holds otherwise, the county auditor and county treasurer must follow the court's holding and disregard the opinion.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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